STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA HOGREBE and WILLIAM HOGREBE, JR.,	UNPUBLISHED December 14, 2010
Plaintiffs-Appellants,	
V	No. 291099 Wayne Circuit Court
CITY OF GROSSE POINTE,	LC No. 08-108624-NO
Defendant-Appellee.	

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order granting defendant's motion for summary disposition on the basis of government immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. We disagree. A decision on a summary disposition motion is reviewed de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 185; 750 NW2d 121 (2008). A motion brought pursuant to MCR 2.116(C)(7) tests whether a claim is barred because of "immunity granted by law." MCR 2.116(C)(7). A motion brought under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). To survive a motion for summary disposition based on government immunity under MCR 2.116(C)(7), a plaintiff must allege facts to justify the application of an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a decision on such a motion, the Court must consider all documentary evidence presented by the parties and accept as true the contents of the complaint, unless specifically contradicted by affidavits or other suitable documents. *Id.* If there is no dispute on the material facts and reasonable minds could not differ as to the legal effect of those facts, then it is a question of law for the Court as to whether the

[1] Plaintiff William Hogrebe, Jr., was dismissed with prejudice by the agreement of all parties. The term "plaintiff" refers to Patricia Hogrebe alone.

plaintiff's claim is barred. *Willett v Waterford Charter Twp*, 272 Mich App 38, 45; 718 NW2d 386 (2006).

Under Michigan law, government agencies are generally immune from tort liability. MCL 691.1407(1). In order to overcome governmental immunity, a plaintiff's claim must fall within a statutory exception. MCL 691.1407(1). Plaintiff argues that her claim falls within the exception provided by MCL 691.1402a(1), which provides:

> Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk. . . . This subsection does not prevent or limit a municipal corporation's liability if both of the following are true:
>
> (a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk . . . .
>
> (b) The defect described in subsection (a) is a proximate cause of the injury, death, or damage.

The statute also provides: "[a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." MCL 691.1402a(2). We note that the parties fail to address the applicability of the two inch rule in light of *Robinson v City of Lansing*, 486 Mich 1; 782 NW2d 171 (2010) and its impact on subsequent appellate decisions including *Gadigian v City of Taylor*, 282 Mich App 179; 774 NW2d 352 (2010). However, we need not address the applicability of the two inch rule in light of the notice provision of MCL 691.1402a(1)(a).

Review of the record reveals that plaintiff is unable to show facts that would demonstrate that defendant had the requisite notice. Defendant asserts that it had no actual notice of the alleged discontinuity, nor should it have had knowledge of the same. On the contrary, plaintiff asserts that defendant must have been aware of the discontinuity because of the meter patrol in the area and the expert's opinion that the condition occurred at least 30 days before the occurrence. Plaintiff offered neither an affidavit, interrogatory response, nor a picture to demonstrate that the parking meter's position was such that a meter reader should have observed the raised sidewalk.

Plaintiff's argument does not raise a genuine issue of fact for a jury. In order to overcome defendant's immunity, plaintiff must be able to show that defendant knew or, in the "exercise of reasonable diligence," MCL 691.1402a(1)(a), should have known about the sidewalk's discontinuity. Plaintiff proffered evidence fails to meet this burden of proof and is merely speculation. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 662; 652 NW2d 625 (2002). Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens